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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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JODI UPTON, CHARLES GARRETT, AND USA TODAY  
*Complainant,*

v.

PURDUE UNIVERSITY,  
*Respondent.*

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Formal Complaint No.  
18-FC-53

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging Purdue University (“Purdue”) violated the Access to Public Records Act<sup>1</sup> (“APRA”). Legal Services Coordinator Kaitlyn Heide filed a response on behalf of Purdue. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on April 9, 2018.

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

## **BACKGROUND**

Charles Garrett, a journalism student at Syracuse University, sent a public records request on January 24, 2018, to the Purdue Office of Legal Counsel on behalf of Professor Jodi Upton of Syracuse University and USA TODAY (“Complainants”). The Complainants requested a number of items related to contracts, revenues, and expenses, including Purdue’s contracts for non-conference men’s basketball games (“guarantee games”) for the 2018-2019 regular season. On February 5, Purdue provided the Complainants with all of the requested records except for the guarantee games contracts. Purdue invoked the deliberative materials exception found in Indiana Code section 5-14-3-4(b)(6), stating that “until the game schedule is finalized, information related to the schedule is considered speculative in nature.” The Complainants responded on February 8 to challenge the denial of the disclosure of the guarantee game contracts, stating that the contracts have already been signed and that while the schedule may be speculative, the contracts themselves are not. The Complainants renewed their request for the guarantee game contracts in their February 8 correspondence. The Legal Services Coordinator said she would look into the matter, and on April 4, 2018, Purdue again denied the request for the guarantee games and stated that the contracts would not be released until the schedule for the season is finalized.

On April 9, 2018, my Office received the Complainant’s formal complaint arguing that the deliberative materials exception to disclosure does not apply to the guarantee game contracts. My Office notified Purdue of the complaint on April 9. Purdue responded to the notice on April 27, 2018.

Purdue states in its response that until the game schedule is finalized, information related to the game schedule—including guarantee game contracts—is speculative in nature pursuant to Indiana Code section 5-14-3-4(b)(6). Purdue noted that they misspoke by stating they denied the Complainant’s request, and explained that they should have said the records were not available yet and that they would be provided to the Complainant as soon as they became finalized.

## ANALYSIS

The primary issue in this case is whether Purdue may withhold guarantee game contracts from public disclosure as “deliberative materials” and the Access to Public Records Act.

### 1. The Access to Public Records Act (APRA)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *Id.* There is no dispute that Purdue University (“Purdue”) is a public agency for the purposes of the APRA; and thus, subject to the Act’s disclosure requirements. Ind. Code § 5-14-3-2(q)(6).

Therefore, unless otherwise provided by statute, any person may inspect and copy Purdue's public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Still, the Act contains both mandatory and discretionary exceptions to the general rule of disclosure. Specifically, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

Notably, the legislature has provided public agencies with the discretion to withhold from disclosure those records that constitute deliberative materials. *See* Ind. Code § 5-14-3-4(b)(6). The subdivision provides, in relevant part:

Records that are intra-agency or inter-agency advisory or deliberative material...that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

### **1.1 The Deliberative Materials Exception**

Deliberative materials include information that reflects, for example, one's ideas, consideration, and recommendations on a subject or issue for use in a decision making process. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002)(quoting *NLRB v. Sears, Roebuck & Co.* 421 U.S. 132, 151 (1975)). The agency denying a request for being deliberative has the

burden of proof to demonstrate that a record qualifies for the deliberative materials exception.

### **1.11 The Two Prong Test for Deliberative Materials**

Indiana Code section 5-14-3-4(b)(6) provides that agencies may release at their discretions records that are intra- or interagency records that are advisory or deliberative material which are “expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.” Records withheld from public disclosure on the basis of this exception must meet both prongs of this definition: (1) an expression of opinion or is speculative in nature and (2) communicated for the purpose of decision making.

Purdue University has not met its burden to show that the guarantee game contracts are either an expression of opinion or speculative in nature. I agree that the game schedule itself, independent from the guarantee game contracts, is speculative in nature. The Complainants provided a copy of a guarantee game contract disclosed by a different university between that university and ESPN Regional Television, and the dates for the guarantee games are listed in the contract. However, there is also a provision disclaiming that the events are subject to change. The dates of the guarantee games may be speculative at this point, but that does not necessarily render the contract speculative in its entirety. Purdue characterizes the guarantee game contracts to be “in negotiation up to the date the schedule is announced;” however, it is clear that these contracts have been signed and finalized. There has been an offer of consideration that has been accepted.

Furthermore, Purdue has not demonstrated that the guarantee game contracts are communicated for the purpose of decision making. There is no indication from Purdue's response that the purpose of the contract is to decide what days the games will be played and that releasing the contract will injure Purdue's decision making process. Purdue asserts that they have protected records from disclosure "that remain in negotiation until they are considered final," but the guarantee game contracts appear to have been finalized and no longer in the negotiation stage. The purpose of the guarantee game contracts are to agree to play non-conference games and to pay the opposing teams predetermined fees, as the Complainant explains in their complaint. This agreement has been finalized, as the decision to play non-conference teams has been made. Only the 2018-2019 game schedule remains undetermined, and the Complainants are not requesting a copy of the game schedule.

I am sympathetic to Purdue's concerns that having tentative game dates published will result in possible confusion over differences between the dates in the contract and the finalized game schedule. However, this inconvenience does not rise to the level of reasonableness needed to withhold public records from disclosure pursuant to the deliberative materials exception. Furthermore, there is a provision in the contract stating that the guarantee game events may change, which puts the reader on notice that the dates are not final.

## **RECOMMENDATION**

Based on the foregoing, it is the opinion of the Public Access Counselor that Purdue University should disclose the guarantee game contracts to the requestors.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor